

Fair Political Practices Commission
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Approval of 2004 Regulatory Priorities

Date: December 1, 2003

I. INTRODUCTION AND BACKGROUND

This memorandum outlines the staff's recommendations for the Commission's CY2004 rulemaking plan. Please note, on November 17, 2003, the Governor issued Executive Order S-2-03 delaying action on proposed regulations and directing agencies of the Executive Branch to reassess various aspects of the State's rulemaking process. Promulgation of any regulations discussed in this memorandum may be delayed pending a determination of the impact of the order, if any, on the Fair Political Practices Commission, an independent agency subject to the 1974 Administrative Procedure Act.

The rulemaking/project calendar is attached as **Appendix 1** and is consistent with the Commission's stated priorities for next year and the priorities set out in the staff memorandum in October. Consistent with prior work plans, this plan allows for quarterly review and revisions and attempts to spread the workload as evenly as possible throughout the year.

We have reorganized the calendar to include a separate list of Proposition 34 projects, as the Commission suggested. A separate memorandum detailing this set of regulatory proposals is attached at **Appendix 2**. We have also added several new items. We have indicated these items with a "NEW" or "CHANGE" indicator in this memorandum.

In preparing the 2004 calendar, staff has included 18 projects and 14 Proposition 34 projects, for a total of 32 projects. Staff is concerned about the sheer number of projects which exceeds the number of regulation projects calendared in prior years. As we have noted previously, the calendar does not reflect other, nonregulatory duties of the Commission. For example, the staff anticipates significant work on advice letters, litigation, opinions, legislation, and various outreach projects (including the League of Cities Conference in February) which are part of the regular work load of the agency and involve significant time commitments. Consequently, we are also recommending the

Commission reduce the work plan by removing several projects. The projects are indicated by “**PROPOSE REMOVE**” and are the projects that the executive staff prioritized as lowest priority items.

II. STATUTE POSSIBLY NEEDING REGULATORY INTERPRETATION IN 2004

ASSEMBLY BILL 1678 (2003-2004), NEGRETE MCLEOD.

Section 87407 prohibits a state administrative official from making, participating in making, or influencing governmental decisions affecting a person with whom the state official is negotiating prospective employment. AB 1678 extends this prohibition to all public officials, state and local.

***CHANGE:** In reviewing the regulation for potential impacts on the regulation, staff has concluded that only technical changes are necessary. Thus, this item has been moved to the technical clean up packet on the regulation calendar and will not be an independent regulatory project.*

III. OTHER CAMPAIGN PROJECTS

1. **Reporting and Recordkeeping for Electronic Payments.** Contributions and expenditures via electronic means (wire transfers, credit cards, etc.) are quickly becoming the method of choice for candidates, committees and contributors, especially statewide candidates and committees who receive and spend several million dollars during each election cycle. However, the statutes and regulations governing the reporting of contributions and expenditures are silent regarding payments that are made by electronic means. The Enforcement Division proposes amending regulations 18401 and 18421.1 to establish the rules regarding the reporting and recordkeeping requirements of electronic payments that are stated in advice letters, fact sheets, and the campaign manual.
2. **Treasurer Duty: All Reasonable Diligence in the Filing of Statements.** Regulation 18427, subdivision (a) provides that a committee treasurer has a duty to use all reasonable diligence in the preparation of campaign statements. However, the regulation lacks any corresponding duty concerning the filing of campaign statements. This creates a perceived ambiguity in the law regarding what a treasurer’s liability may be when the treasurer’s committee fails to file campaign statements as provided by law. Enforcement staff proposes that Regulation 18427, subdivision (a) be amended to add the words “and filing” after the word “preparation” in that subdivision.
3. **Aggregation under section 84308:** Section 84308 disqualifies any “officer” of a public agency, who is running or has run for elective office, from participating in decisions affecting his or her campaign contributors. The statute provides that when a

closed corporation is a party (or participant), the majority shareholder of the corporation is also a party (or participant). This project considers whether further clarification of this aggregation rule is necessary.

CHANGE: *This item is being carried over from 2003.*

4. **Regulation 18425: Late Contribution Reports.** Amend the regulation to allow estimated reports during the 90-day election cycle and to allow estimated reports of independent expenditures reported during the same period. (Resubmitted from last year.)

PROPOSE REMOVE

5. **Requested Amendment to Regulation 18116: Filing Dates. August 5, 2002 letter from Colleen C. McAndrews.** An issue concerning filing late contribution reports (“LCRs”) on the weekend arose at the December 2001 meeting during consideration of permanent adoption of Proposition 34 regulations 18539 (online disclosure of contributions) and 18550 (online disclosure of independent expenditures). Regulation 18116 provides that when reports filed under the Act are due on a Saturday, Sunday, or official state holiday, the deadline is changed to the next working day, except for late contribution reports and late independent expenditure reports. The weekend extension applies to the new \$1,000 and \$5,000 reports added by Proposition 34, but does not apply to the traditional late contribution reports. Colleen McAndrews of Bell, McAndrews, Hiltachk and Davidian submitted two letters to the Commission on March 8, 2002, and August 5, 2002, suggesting that the weekend extension be applied to traditional LCRs. Ms. McAndrews suggested that traditional late contribution reports should not be excepted out of the next regular business day extension in regulation 18116. She suggested that weekend 24-hour reporting could be preserved for LCRs on the final weekend before the election, but that prior weekends could be exempted out.

PROPOSE REMOVE: *Both Enforcement and Legal Division staff have concerns both about the statutory authority for this regulatory action, as well as the enforcement implications. In light of these concerns, and the fact that the regulation will take significant staff resources, staff recommends removal of this item.*

IV. CONFLICT OF INTEREST AND LOBBYING

These first three items are large projects which may involve amendment to more than one regulation. As noted previously, these projects will require more than one meeting (Commission meetings or interested person meetings) and a significant amount of staff preparation time.

1. **Government Code section 1090¹ Merger Project.** The Commission previously decided to solicit public participation in a study of the possible merger of conflict-of-interest laws that are not currently in the Act into the framework of the Act. The rationale for this proposal is that by moving the provisions into the Act, the Commission could further clarify and implement the sections through its administrative rulemaking process and provide advice to officials attempting to comply. Under consideration for merger are sections 1090 et seq., Public Contracts Code sections 10410 et seq., and the common law doctrine against conflicts of interests. This project was started in 2003 and will continue into 2004.
2. **Gift Tickets Cluster.** The receipt of gifts by a public official has many ramifications under the Act. First, every public official must disclose all of his or her economic interests that could foreseeably be affected by the exercise of the official's duties, including gifts, if the value of gifts received from the donor during the calendar year is worth \$50 or more. (Sections 81002(c), 87200-87313.) Moreover, section 87100 prohibits any public official at any level of state or local government from making, participating in making, or attempting to use his or her official position to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on any donor or, or any intermediary or agent for a donor of gifts aggregating \$340 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. (Section 87103(e).) And finally, the Act provides calendar year gift limits on most public officials limiting gifts from a single source in a calendar year to \$340. (See e.g., section 89503.) Two specific issues have arisen concerning the value of gifts:
 - **Valuation of Tickets to Invitation-Only Events:** Commission staff was asked to provide advice concerning a party hosted by a private entity. The party was an invitation-only event with no admission price. The sponsor sent various city and county officials free admission tickets that had no stated purchase price on their face. Historically, the valuation of these types of passes has been a pro rata share of the total cost. This proposal would codify the valuation rule for these situations, including specifying which tangible and intangible benefits must be included (such as entertainment).
 - **Valuing Tickets to a Fundraising Event for a 501(c)(3) Organization:** Regulation 18946.4, subdivision (b) provides that a ticket or other admission privilege to a fundraising event for an organization exempt from taxation under Internal Revenue Code section 501(c)(3) has no value. Pursuant to this exception, Commission staff has advised that tickets to the Rose Bowl Game and grandstand seating at the Rose Parade have no value. Enforcement

¹ All statutory references are to the Government Code unless otherwise indicated.

proposes that the Commission revisit regulation 18946.4 and consider amending it to narrow the exception for 501(c)(3) fundraising events to exclude tickets to events that are being commercially marketed, such as Rose Bowl tickets, or to set the value of this subset of fundraising tickets to the face of the tickets.

***CHANGE:** In light of the number of regulations on the 2004 calendar, we are recommending that if the Commission decides to pursue this major project, that the two projects in section V pertaining to administrative matters (or some other comparable projects) be removed from the calendar.*

3. **General Plan Cluster.** Some agencies are viewing general plan amendments as coming within the purview of “zoning or rezoning” decisions under subdivisions (a)(1) and (a)(6) of regulation 18704.2. Because general plans cover the entire jurisdiction, officials of these agencies believe they cannot participate in such decisions unless the “public generally” or “legally required participation” exceptions apply. This results in substantial difficulties, in that all of the members of a governing board of an agency may be unable to participate in some of the most fundamental decisions affecting the entire jurisdiction. This project now includes the following subprojects:
 - **Public Generally:** Staff will explore the development of a stand-alone regulation pertaining solely to General Plan decisions that addresses (1) real property; (2) business entities; and (3) sources of income. Such a regulation may parallel and/or cite to existing provisions of regulation 18707.1 in providing a more narrowly tailored “public generally” exception analysis to be applied to general plan decisions. Staff will further examine if there is a way of further clarifying the “substantially the same manner” prong of this analysis.
 - **Direct/Indirect:** Staff will also continue to examine how general plan issues can be addressed at Step Four (Assessment of Direct/Indirect Involvement) and Step Five (Identification of the Materiality Standard) of the Commission’s conflict of interest analysis.
 - **Foreseeability:** Consideration of clarification of the “reasonably foreseeable” standard to deal with problems associated with general plan decisions.
 - **Standard of Care:** What constitutes a reasonable effort by a public official to comply with this law? What is the “standard of care” required of a public official deciding whether he or she has a conflict of interest? To what extent, if any, should making that reasonable effort (or complying with that standard of

care) shield the public official from after-the-fact second-guessing, including prosecution for violating the Act if his or her prediction turns out to be wrong?

- **Conforming Changes to 18700:** (including adding segmentation, specifically addressing burden of proof/production issues, and related changes resulting from other substantive amendments made to the regulations).
4. **Regulation 18703.1:** Regulation 18703.1 defines an “economic interest” in the context of the conflict-of-interest rules of the Act. However, subdivision (d)(3) provides that otherwise related business entities do not have to be reported. This sweeping statement can be read to swallow up the statutory requirement in section 87207(b) which requires disclosure of the pro rata share of investments held by a business entity in which the official has a 10 percent or greater investment interest (even subsidiaries). A clarifying amendment may be necessary.
 5. **Sections 87202 and 87204:** Assuming and Leaving Office Statements. Staff is recommending that the Commission adopt a regulation clarifying when an official has assumed or left office triggering the filing of statements of economic interest. Currently, Commission advice for statements of economic interests may be different than the interpretation used in the revolving door context. Staff is also asking the Commission to consider a regulation clarifying filing requirements for alternates and designees.
 6. **Excluding Appointments and Unique Financial Effects from the Governmental Salary Exception.** The Enforcement Division has proposed amending the “personal financial effect” rule to cover certain appointment decisions. Currently, a decision affecting the governmental salary of an official or his or her spouse does not give rise to a conflict of interest *unless* the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position. (Regulation 18705.5(b).) Enforcement proposes amending the governmental salary exception in Regulation 18705.5 to expressly preclude appointment of the official’s spouse and any decision impacting the salary of the official or the official’s spouse where the official or member of his or her immediate family is the only person in the job classification or position.

PROPOSE REMOVE

7. **Regulation 18616:** The lobbying disclosure provisions of the Political Reform Act require reporting of “payments to influence legislative or administrative action,” which are defined in § 82045 to include payments for or in connection with

soliciting or urging other persons to enter into direct communication with an elective state official, legislative official, or agency official. This type of activity is commonly referred to as “grassroots lobbying.” Regulation 18616(g)(5) provides an exemption to the Act’s lobbying disclosure rules for payments to influence certain proceedings before the Public Utilities Commission. The proposed amendment will clarify that payments for or in connection with soliciting or urging others to engage in direct communication with the Public Utilities Commission are not included in the exemption.

8. **Guidelines and Procedures for Filing Officers/Officials:** In 2002, the Commission asked staff to study five projects that addressed various issues regarding conflict of interest codes and statements of economic interests. At its October 2002, meeting, staff’s report regarding Project A-5 Placement of Positions in Conflict of Interest Codes concluded that agencies should continue to adopt and implement their own methods for identifying their designated employees. However, the memo discussed that during staff’s review, it identified additional guidelines, including concrete timelines for notification that should be explored to ensure that everyone knows about their obligation to file statements of economic interests. The Commission agreed that filing officer obligations and notification requirements should be studied and encouraged staff to solicit public comment from affected persons. At its December 2003, meeting, the Commission is scheduled to consider the staff report on the project and determine whether it wishes to pursue a statutory, regulatory or less formal approach addressing the notification issues. In the event a regulatory approach is selected, the matter will need to be scheduled on the calendar accordingly.

***CHANGE:** This item is being carried over from last year’s calendar. However, staff is recommending that no further action be taken on this item and that it not be included in the 2004 calendar.*

V. ADMINISTRATIVE, ENFORCEMENT, AND OTHER ISSUES²

1. **Confidentiality of Enforcement Cases.** Historically, it has been the policy of the Agency to keep confidential the existence of any investigation into a suspected violation of the Act until after a Probable Cause Order has been issued regarding the violation, or the investigation has resulted in the submission of an administrative stipulation to the Commission or the filing of a civil complaint. It has also been the policy of the Agency to keep confidential any information discovered during the course of an investigation until after the investigation has been concluded, and any resulting prosecution has been concluded. Enforcement Division staff proposes the addition of a regulation, interpreting section 83115, that

² As we noted above, due to the number of regulations on the 2004 calendar, we are recommending that if the Commission decides to pursue the gift cluster described in section IV above, that the two projects in this section be removed from the calendar.

expressly provides for the confidentiality of Agency investigations, describing the scope of that confidentiality, and any exceptions the Commission may wish to build into it. This regulation could take the form of an amendment to existing regulation 18362, governing "Access to Complaint Files."

2. **Precedential Decisions in Enforcement Actions.** Section 11425.60 of the California Administrative Procedure Act provides general authority to the Commission to designate decisions as precedential. Enforcement is proposing the Commission consider a regulation establishing a precedential decision system and setting forth various criteria for the Commission to consider in determining whether to designate a decision as precedential.

VI. OTHER MISCELLANEOUS ITEMS

1. **Annual Technical Clean-up.** The Commission considers annually changes to Commission regulations that resulted from the staff's review for technical and other minor changes. Included in this packet is a proposal to improve regulation 18361 by separating the regulation into distinct subject matter regulations.
2. **Gift, Contribution, and Expenditure Limit Adjustments.** New contribution and expenditure limits, and the gift limit of the Act took effect January 1, 2003 and will remain unchanged until December 31, 2004. Thus, the Commission will need to adjust these limits in 2004, effective January 1, 2005.
3. **Regulation 18901. Mass Mailing Prohibition.** Staff is proposing holding an interested persons meeting for the middle of the year to discuss possible amendment to regulation 18901 as requested by Senator Ross Johnson. This item would not be added to the regulatory calendar pending input from the interested persons meeting.

Appendix 1: Regulation Calendar

**Appendix 2: Proposition 34 Retrospective –
Proposed Regulatory Refinements.**